Supreme Court, U.S.
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No. 95-707

In The

Supreme Court of the United States

October Term, 1995

SAVANNAH FOODS & INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL UTILITY SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a party is entitled to summary judgment in a state law breach of contract action where (a) there are no genuine issues of material fact that the substantive requirements of the contract under governing state law have been performed, and (b) the issues raised by the nonmoving party relate only to defenses that are legally insufficient under governing state law.

STATEMENT UNDER RULE 29.6

Respondent, National Utility Service, Inc., has no parent company and no non-wholly owned subsidiary. It is not publicly held.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

STATEMENT UNDER RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

A. Procedural History 1

B. Statement of Facts 2

SUMMARY OF REASONS FOR DENYING THE WRIT 4

REASONS FOR DENYING THE WRIT 6

POINT I PETITIONER'S "QUESTION PRESENTED FOR REVIEW" IS NOT RAISED BY THE THIRD CIRCUIT'S DECISION 6

POINT II THE COURT'S PRIOR DECISIONS ON THE STANDARD FOR GRANTING SUMMARY JUDGMENT ARE CONTROLLING, HAVE BEEN APPLIED CONSISTENTLY BY THE LOWER COURTS, AND WERE APPLIED PROPERLY IN THIS CASE 10

A. The standard on summary judgment is clear and well established 10

B. Supreme Court precedent on summary judgment is consistently applied 12

TABLE OF CONTENTS – Continued

Page

C. Supreme Court precedent on summary judgment was applied properly by the lower courts in this case..... 13

POINT III BECAUSE THE COURT OF APPEALS DID NOT REWRITE, BUT MERELY EXPLAINED RESPONDENT'S RECOMMENDATION, THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION TO REVIEW THIS STATE LAW CONTRACT DISPUTE..... 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Anchorage Associates v. V.I. Bd. of Tax Review, 922 F.2d 168 (3d Cir. 1990) 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 6, 10, 11, 13

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) ... 6, 10, 11, 14

Hickson v. Home Federal of Atlanta, 805 F.Supp. 1567 (N.D. Ga. 1992), *aff'd*, 14 F.3d 59 (11th Cir. 1994) 13

Improvement Co. v. Munson, 14 Wall. 442 (1872) 11

Kodak v. Image Technical Services, Inc., 504 U.S. 451 (1992) 6

Local Union 42 v. Absolute Environmental Serv., Inc., 814 F.Supp. 392 (D. Del. 1993) 12

Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) 6

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 6, 10

National Utility Service, Inc. v. Callahan Mining Corp., 799 F.Supp. 1004 (N.D. Cal. 1990) 8

National Utility Service, Inc. v. J. R. Sexton, Inc., 1989 WL 343048 (D. Conn., November 3, 1989) 8

Vigars v. Valley Christian Center, 805 F.Supp. 802 (N.D. Cal. 1992) 12

Watts v. United States, 703 F.2d 346 (9th Cir. 1983) 13

STATUTES AND RULES

15 U.S.C. §§ 717, *et seq* 4

Fed. R. Civ. P. 56 ..... 5, 6, 13

Sup. Ct. Rule 15.2 2

OPINIONS BELOW

Both the Opinion of the United States Court of Appeals for the Third Circuit and the Opinion of the District Court of New Jersey are endorsed to be "Not for Publication." The Judgment of the Court of Appeals is published at 61 F.3d 895 (1995).

STATEMENT OF THE CASE

Respondent submits this Brief in Opposition to the Petition for a Writ of Certiorari (the "Petition") filed by Petitioner. This Brief in Opposition provides Respondent's reasons for denying the Petition, and addresses specific perceived misstatements and omissions of fact and law in the Petition.

A. Procedural History

This is an action for services rendered under an energy cost consulting agreement in which state law governs. The District Court granted summary judgment in favor of the consultant, National Utility Service, Inc. ("Respondent"). Its customer, Savannah Foods & Industries, Inc. ("Petitioner"), appealed to the Court of Appeals for the Third Circuit, which dispensed with hearing argument and affirmed. Petitioner filed a Petition for Panel Rehearing and Suggestion for Rehearing In Banc; that Petition was denied. Petitioner then applied to the Court of Appeals for a stay of issuance of the mandate. That application was also denied. Petitioner then applied to Justice David H. Souter for a stay upon the grounds that

(a) there is a "reasonable probability" that four Justices will consider the issues sufficiently meritorious to grant certiorari; (b) there is a "fair prospect" that a majority of the Court will conclude that the decision below was erroneous; and (c) irreparable injury is likely to result from denial of a stay. Justice Souter denied Petitioner's application for a stay. The issue of post-judgment interest remanded by the Court of Appeals has been resolved by the entry by the District Court of a stipulated amended judgment.

B. Statement of Facts

Respondent adopts the summary of the facts contained in the unpublished Opinion of the Court of Appeals, filed June 29, 1995 (Pet. App., 2a-5a), and the section entitled "Background" in the District Court's unpublished Opinion (Pet. App., 14a-19a).

Pursuant to Sup. Ct. Rule 15.2, Respondent also provides the following corrections of perceived misstatements of fact and law and omissions of significant facts in Petitioner's Statement of the Case (Petition, 3-5).

1. Petitioner omits that recommendation "4" in the report sent by Respondent to Petitioner in April, 1985 (the "April 1985 Report") suggested that Petitioner investigate receiving natural gas from wellhead producers if its gas supplier, Southern Natural Gas Company ("Southern"), was unwilling to renegotiate its contract with Petitioner (Pet. App., 3a, 16a-17a).

2. Petitioner misstates that the memorandum of Southern's employee, George A. Mattison, IV, dated

March 31, 1986 (the "March 31, 1986 Memo"), "is direct evidence that [Petitioner's] cost savings did not result from the adoption of the recommendation made in April 1985 by [Respondent]." (Petition, 5). Petitioner omits that on August 9, 1985 (following its receipt of the April 1985 Report), it was taking the course of action of renegotiating its gas purchase contract with Southern as the April 1985 Report recommended (A 791),[1] and that on September 11, 1985 (less than five months after the April 1985 Report), Eugene G. Clarke ("Clarke"), Petitioner's Chief Engineer (who reported directly to George Fawcett, its Vice President of Operations and a recipient of the April 1985 Report) (A 414-15), wrote to Southern "to determine how [Petitioner] can best approach the use of transportation gas."[2] (A 794).

Thus, Petitioner omits that Clarke's letter is direct evidence that Petitioner took the course of action recommended by Respondent, to wit; after Southern expressed an unwillingness to renegotiate Petitioner's gas purchase contract, Petitioner acted to investigate ways to receive transportation gas. The March 31, 1986 Memo, partially quoted in the Petition, merely recorded Southern's meeting with Clarke to implement the transportation gas recommendation contained in the April 1985 Report and subsequently reiterated by Respondent.

3. In attributing the gas cost savings to Southern's effort to replace sales of gas that it would have lost if

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[1] "A___" refers to the parties' Joint Appendix in the Court of Appeals.

[2] "Wellhead gas" and "transportation gas" are interchangeable terms. (A 404)

Petitioner used alternative fuels, Petitioner omits informing this Court that the April 1985 Report suggested that Petitioner renegotiate its gas purchase contract with Southern by using its threat to stop buying Southern's gas as a strategy and for negotiation leverage (Pet. App., 2a-3a). Thus, Petitioner omits acknowledging this direct evidence that it took the course of action recommended by Respondent.

4. Petitioner misstates Respondent's recommendation (Petition, 11). Respondent recommended that Petitioner "investigate ways of receiving [its] natural gas from various wellhead producers, depending on the outcome of FERC's hearing concerning 'mandatory carriage'." (Pet. App., 3a). Clearly, Respondent recommended that Petitioner *investigate* receiving wellhead gas, and Petitioner did so, by thereafter successfully negotiating ways to receive wellhead gas pursuant to an individual certificate under Section 7(c) of the Natural Gas Act of 1938. 15 U.S.C. §§ 717, *et seq.*

SUMMARY OF REASONS FOR DENYING THE WRIT

This is a simple diversity jurisdiction state law contract action. It contains no unsettled federal issue and no constitutional issue. In fact, it contains no substantive issue of federal law at all. The Court of Appeals did not misapply Supreme Court precedent and did not act in any way as to require the exercise of the Supreme Court's supervisory power.

Petitioner's "Question Presented for Review" and "Reasons for Granting the Writ" (Petition, 5-15) assumes

that the lower courts found that the Agreement requires Respondent to prove what part its April 1985 Report played in Petitioner's later decision to receive transportation gas. However, the lower courts found that the Agreement is unambiguous and simply does not require Respondent to prove any causative part its April 1985 Report played in Petitioner's decision. The lower courts drew no inferences from the evidence, either in favor of Respondent or against Petitioner. Therefore, the Petition misconstrues the lower courts' Opinions. Since the lower courts did not rely exclusively on inconclusive circumstantial evidence when they granted and affirmed summary judgment, the "Question Presented for Review" is not raised by the decisions below or supported by the Record.

Besides misstating the legal analysis applied by the lower courts, Petitioner has not set forth a compelling reason for this Court to readdress the summary judgment standard that applies when the movant has the burden of proof. This case involves no area of conflict among the circuit courts regarding the well-settled standard for granting summary judgment to a moving party and the standard for granting summary judgment against a non-moving party with the burden of proof. Additionally, Petitioner has failed to demonstrate that the lower courts have had difficulty in applying Supreme Court precedent on Fed. R. Civ. P. 56, or that the lower courts in this case misapplied that precedent.

REASONS FOR DENYING THE WRIT

POINT I

PETITIONER'S "QUESTION PRESENTED FOR REVIEW" IS NOT RAISED BY THE THIRD CIRCUIT'S DECISION

This is a state law breach of contract action for services rendered. New York State substantive law was applied. As shown by the manner in which Petitioner litigated this case in the courts below, Petitioner's real dispute is with the way the lower courts applied New York's substantive law. The Court of Appeals' unpublished Opinion reveals that Petitioner did not frame its appeal as presenting a specific legal question regarding the meaning of Fed. R. Civ. P. 56, or as providing the Court of Appeals with an opportunity to fill in perceived inadequacies in the following Supreme Court precedent on Rule 56: *Kodak v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Rather, because Petitioner appealed the case to the Court of Appeals as presenting a fact-specific question unique to these parties, the lower court had no reason to address the question presented as presently formulated by Petitioner.

Additionally, Petitioner's "Question Presented for Review" is based upon the faulty premise that, under state contract law found and affirmed by the lower courts, the Agreement requires Respondent to prove that it was the cause of Petitioner's energy cost savings, and

that summary judgment was based *exclusively* on inconclusive inferences drawn on that issue. However, the lower courts agreed that, as a matter of state law, the Agreement does not require Respondent to prove the state of mind that caused Petitioner's purchase of transportation gas.[3] Thus, the "Question Presented for Review" is not even raised by the lower courts' Opinions or supported by the Record.

After holding that the Agreement was "a facially simple and unambiguous expression of agreement between the parties" (Pet. App., 31a), the District Court addressed and rejected Petitioner's defenses including, *inter alia*, that despite the publication to Petitioner of Respondent's April 1985 Report, it independently conceived of the idea of the purchase of transportation gas, stating:

> [I]t *makes no difference* what [Petitioner] did to reduce its utility expenses after it entered into the Agreement with [Respondent]. Once the Agreement was executed, [Petitioner] worked independent of [Respondent] at its own risk.

(Pet. App., 31a (emphasis added)). The District Court found that "[t]he Agreement requires that [Respondent] need only make a recommendation in order to qualify for payment if its recommendation was thereafter successfully used by [Petitioner]." (Pet. App., 31a). Thus, the lower courts determined that proof of causation between the recommendation and the state of mind resulting in

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[3] The Court of Appeals adopted the District Court's Opinion on the issue of liability. It therefore drew no inferences on the issue of causation (Pet. App. 6a).

the decision to take the recommended action is not a substantive requirement of the Agreement.

Judge Cabranes, in construing similar contractual language, reached the same conclusion in *National Utility Service, Inc. v. J. R. Sexton, Inc.*, 1989 WL 343048 (D. Conn., November 3, 1989),[4] stating, at App., 5a:

> The court finds that the language of the contract is unambiguous. The contract states that any recommendation acted on shall be deemed accepted. This language unambiguously means that if [Respondent] recommends a course of action and [the client] subsequently takes that course and achieves utility bill savings as a result, [the client] is obligated to compensate [Respondent]. The contract nowhere suggests or envisages an inquiry into the state of mind of [the client] or its officials to determine the degree to which they were influenced by factors other than [Respondent's] report to adopt the course of action recommended by [Respondent].

See also, National Utility Service, Inc. v. Callahan Mining Corp., 799 F.Supp. 1004 (N.D. Cal. 1990) (proof of causation between Respondent's advice and energy cost savings is not required by the agreement).

Therefore, it is immaterial whether Respondent's recommendation was a factor in Petitioner's state of mind that caused it to take the same action recommended by Respondent. It is also immaterial whether allegedly different regulatory and market conditions may have encouraged Southern to accede to Petitioner's request for

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[4] A copy of the court's opinion in *National Utility Service, Inc. v. J. R. Sexton, Inc.* is annexed as Respondent's Appendix.

transportation services, as anticipated in the April 1985 Report. Under the substantive law of New York, the only facts material to Respondent's claim for breach of the Agreement are whether Petitioner took the course of action after it was recommended by Respondent and whether it thereafter realized gas cost savings. Because there was no genuine issue regarding these material facts, summary judgment was appropriate.

Petitioner uses a fact issue that the lower courts held was immaterial as a matter of state substantive law to create an argument that the lower courts wrongly decided an issue of federal procedural law. Because a) the Agreement did not require Respondent to prove causation as an element of its claim, b) no inferences (either in favor of Respondent or against Petitioner) were drawn by the lower courts, and c) the lower courts did not rely exclusively on inconclusive circumstantial evidence when they granted and affirmed summary judgment to Respondent, the Petitioner's "Question Presented for Review" is not raised by the decision below or supported by the Record.

POINT II

THE COURT'S PRIOR DECISIONS ON THE STANDARD FOR GRANTING SUMMARY JUDGMENT ARE CONTROLLING, HAVE BEEN APPLIED CONSISTENTLY BY THE LOWER COURTS, AND WERE APPLIED PROPERLY IN THIS CASE

A. The standard on summary judgment is clear and well established.

In 1986, this Court decided a trilogy of cases that marked the new era in summary judgment motion practice: *Anderson v. Liberty Lobby, Inc., supra; Celotex Corp. v. Catrett, supra;* and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., supra.* According to then Justice Rehnquist, this trilogy of cases signalled to courts and practitioners that summary judgment would no longer be viewed "as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett,* 477 U.S. at 327. Now, when that signal has been received and implemented without difficulty by the lower courts, Petitioner argues that the salutary effect of summary judgment should be curtailed in cases such as this one. Without presenting compelling, or even applicable reasons, Petitioner urges this Court to revisit its summary judgment standard.

Petitioner misstates that this Court has never addressed the summary judgment standard to be applied when the movant has the burden of proof. In *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 251, this Court analogized summary judgment policy to the policy applicable in a

motion for a directed verdict, and reached back to a series of cases, beginning with *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872), which held that before a case may be presented to a jury, it is a preliminary question for the judge to determine whether a jury could properly find for the party "upon whom the onus of proof is imposed (footnotes omitted)." Thus, while the movant must show that there is no genuine issue of material fact, the party opposing the motion is not relieved of its burden of producing evidence that would support a jury verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256. As succinctly stated by then Justice Rehnquist in *Celotex Corp. v. Catrett*, 477 U.S. at 322-23:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case concerning which she has the burden of proof.

B. Supreme Court precedent on summary judgment is consistently applied.

Petitioner requests this Court to review an issue that has been comprehensively addressed previously and which has created no conflicts, disagreements or difficulties in the lower courts.

Petitioner cites several lower court decisions as recognizing a distinction between the standard for granting summary judgment to a moving party with the burden of proof and the standard for granting summary judgment against a nonmoving party with the burden of proof. Significantly, these cases uniformly state that the summary judgment standard of this Court's trilogy of cases applies when the movant has the burden of proof. Supreme Court review of this issue is, therefore, unwarranted. *Compare Anchorage Associates v. V.I. Bd. of Tax Review*, 922 F.2d 168, 175 (3d Cir. 1990) ("Where the moving party has the burden of proof on the relevant issues . . . the District Court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law."); *Local Union 42 v. Absolute Environmental Serv., Inc.*, 814 F.Supp. 392 (D. Del. 1993) ("When the moving party seeks summary judgment based on a claim or defense upon which the moving party bears the ultimate burden of proof at trial, the moving party must establish every element of that claim or defense as a matter of law such that no reasonable jury could return a verdict for the nonmovant."); *Vigars v. Valley Christian Center*, 805 F.Supp. 802, 805 (N.D. Cal. 1992) ("Where the moving party will have

the burden of proof on an issue at trial, she must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party."); and *Hickson v. Home Federal of Atlanta*, 805 F.Supp. 1567, 1574 (N.D. Ga. 1992), *aff'd*, 14 F.3d 59 (11th Cir. 1994) ("[W]here the movant is the plaintiff, that party must demonstrate the absence of an issue of material fact with regard to every element essential to his or her claim.") *See also Watts v. United States*, 703 F.2d 346 (9th Cir. 1983).

Each lower court cites one or more of this Court's trilogy of summary judgment cases and reaches the same conclusion on the standard applicable to a motion for summary judgment where the movant has the burden of proof. Those lower courts do not suggest that they need Supreme Court guidance on this issue, and they do not indicate that the standard is unsettled or unclear. The standards set by this Court in 1986, and reaffirmed thereafter, are being applied consistently.

C. Supreme Court precedent on summary judgment was applied properly by the lower courts in this case.

Neither the Court of Appeals nor the District Court misapplied Supreme Court precedent on Fed. R. Civ. P. 56. The District Court articulated the summary judgment standard when it stated:

> Whether a fact is material is determined by the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue involving a material fact is genuine "if the evidence is such that a reasonable jury could return

> a verdict for the nonmoving party." (citation omitted).
>
> The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party satisfies this requirement, the burden shifts to the nonmoving party to present evidence that there is a genuine issue for trial. *Id.* at 324.

(Pet. App., 19a-20a).

In applying this standard, the lower courts determined that the only material facts are whether Petitioner took the course of action after it was recommended by Respondent and whether it thereafter realized utility cost savings (Pet. App., 30a-31a). Because there was no genuine issue regarding these material facts, the burden was upon Petitioner, as the party opposing summary judgment, to present evidence that there was a genuine issue of fact material to some legally sufficient defense. Petitioner failed to sustain its burden because its evidence consisted exclusively of immaterial arguments to support legally insufficient defenses.

In summary, this Court's prior decisions are comprehensive and controlling, the lower courts have applied those decisions consistently, and the lower courts in this case applied those decisions correctly. When considering these factors together with Petitioner's failure to assert any compelling reason for further review by this Court, it must be concluded that the Petition should be denied.

POINT III

BECAUSE THE COURT OF APPEALS DID NOT REWRITE, BUT MERELY EXPLAINED RESPONDENT'S RECOMMENDATION, THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION TO REVIEW THIS STATE LAW CONTRACT DISPUTE

Petitioner requests this Court to review a decision on a state law contract dispute that has already been reviewed by the Court of Appeals. Especially where, as in this case, there is no burning question of federal law or public policy to be formulated or clarified, the Court should deny Petitioner's application.

Petitioner seizes upon the word "implication" in the Court of Appeals' discussion of Respondent's recommendation and urges this Court to exercise its extraordinary supervisory power. To support its argument, Petitioner misstates that the word "implication" shows that the lower court "rewrote the recommendation to support a summary judgment in favor of [Respondent]." (Petition, 14). When viewed in context, however, clearly the Circuit Court's discussion of Respondent's recommendation simply used the word "implication" as a synonym for "connotation," or "effect."

In its summary of the facts, the Court of Appeals quoted the five approaches for gas cost savings recommended by Respondent in its April 1985 Report. Recommendation 4 stated that Petitioner "should investigate ways of receiving [its] natural gas from various wellhead producers, depending on the outcome of FERC's [Federal Energy Regulatory Commission's] hearing concerning 'mandatory carriage'." (Pet. App., 3a). In discussing that

recommendation, the Court of Appeals stated that it understood that "mandatory carriage" referred to proposed regulations requiring natural gas companies to provide "for transmission of gas not owned by them through their pipelines." (Pet. App., 3a). The lower court then stated that the "implication" of the recommendation is that Petitioner's contract with Southern should be renegotiated "to [provide] for Southern to transport wellhead gas that [Petitioner] purchased from other producers." (Pet. App., 3a-4a). Considering that this recommendation identifies Southern as Petitioner's gas company, the "implication," connotation or effect is clear that Southern would become the transporter of gas which [Petitioner] purchased from others.

The Court of Appeals did not rewrite the recommendation. It did not find that Respondent was "entitled to a favorable 'implication' from" the language of the report (Petition, 14). The lower court merely described the recommendation.

The recommendation was not a contract. Thus, the cases cited by Petitioner that the courts lack the power to rewrite contracts are inapposite. Even assuming, *arguendo*, that the lower courts were construing the Agreement, that act of construing the Agreement was governed by state contract law principles. Petitioner's claim that the lower courts applied those principles incorrectly does not merit the extraordinary exercise of this Court's supervisory powers.

There is no need for this Court to exercise its power of supervision because the lower courts did not rewrite the recommendation or the Agreement. There was no

departure from the accepted and usual course of judicial proceedings by the lower courts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Dated: December 1, 1995

Respectfully submitted,

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APPENDIX

NATIONAL UTILITY SERVICE, INC.

v.

J.R. SEXTON, INC.

Civ. No. N-88-324(JAC).

United States District Court, D. Connecticut.
Nov. 3, 1989.

RULING ON PENDING MOTIONS

JOSE A. CABRANES, District Judge:

This case involves a contract between plaintiff NATIONAL UTILITY Service, Inc. ("N.U.S."), a utility analyst and consulting service, and defendant, J.R. SEXTON, Inc. ("SEXTON"). Under this agreement N.U.S. undertook to analyze SEXTON'S utility usage and submit recommendations of means to effect utility cost savings. If SEXTON implemented any such recommendation, in addition to an initial fee of $5,000 it was to transmit its utility bills to N.U.S. so that resulting savings could be determined. After the amount of $5,000 in savings was realized, defendant was to pay plaintiff 50% of its utility bill savings for 60 months. Plaintiff alleges that defendant implemented plaintiff's recommendations but failed to fulfill its obligations under the contract to pay its fees and to transmit its utility bills to plaintiff to allow a determination of amounts of money owed.

Plaintiff alleges breach of contract (Count 1), unjust enrichment (Count 2), and violation of the Connecticut Unfair Practices Act (CUTPA), C.G.S. ss 42-110(a) et seq. (Count 3). Plaintiff seeks compensatory and punitive damages, attorney's fees, a declaratory judgment, and specific performance.

Currently before the court are two motions, Plaintiff's Motion for Summary Judgment (filed Sept. 15, 1989) and Defendant's Motion for Summary Judgment Against Plaintiff, National Utility Service, Inc. (filed Sept. 15, 1989). The latter motion is addressed solely to the CUTPA claim in Count 3 of the complaint and is thus deemed a motion for partial summary judgment.

For the reasons stated below, plaintiff's motion for summary judgment is granted in part, as to liability for Count 1 (breach of contract) and denied in all other respects. Defendant's motion for partial summary judgment as to the CUTPA claim is granted. These claims shall be addressed, in turn, below.

DISCUSSION

Summary Judgment Standards

The court may grant summary judgment where the moving party has demonstrated that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."). A motion for summary judgment thus is the appropriate vehicle "to isolate and dispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

In making a summary judgment determination, the court must resolve all ambiguities and draw all reasonable inferences in favor of the plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255; Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir.1986) (Feinberg, C.J.), cert. denied, 480 U.S. 932 (1987). The court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, a party may not "rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Knight v. U.S. Fire Ins. Co., 804 F.2d at 12. Mere conclusory allegations and denials in legal memoranda or oral argument are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist. See Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir.1980); British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir.1978), cert. denied, 440 U.S. 981 (1979). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

Claim of Breach of Contract

Plaintiff claims it is entitled to judgment as a matter of law as to the claim of breach of contract. Defendant responds by alleging that the contract between the parties is ambiguous in relevant part and therefore a genuine issue of material fact exists as to whether Sexton's actions in refusing payment constituted a breach of that contract. In particular, defendant claims that a disputed question

exists as to whether Sexton adopted N.U.S.' recommendation regarding utility usage.

It is not disputed that Sexton made a change identical to that recommended by N.U.S., namely, it arranged to purchase natural gas under an "interruptible rate." It is also undisputed that this change was made subsequent to the receipt of the N.U.S. report. In fact, Sexton's letter to the utility company requesting the interruptible rate was identical, save for the substitution of Sexton's letterhead, to the suggested letter enclosed for this purpose in the N.U.S. report. Sexton claims that this does not constitute an adoption of the recommendation in the N.U.S. report envisaged by the agreement because the same change of service was previously recommended to them by their utility company and it was the recommendation of the utility company, and not of N.U.S., that caused Sexton to make the change.

The relevant language in the contract provides that, [a]ny [N.U.S.] recommendation acted on by [Sexton] shall be deemed accepted. . . . [N.U.S] will not share in any reductions or savings effected solely by the lowering of rate schedules of any public utility corporation which they voluntarily apply to [Sexton's] bills and which are not influenced by [N.U.S.'] prior recommendations to [Sexton]. [Sexton] will pay [N.U.S.] only for savings which actually become effective on [Sexton's] bills after [N.U.S.'] recommendation is implemented. (emphasis added).

Sexton claims that this language is ambiguous and permits more than one fairly reasonable interpretation and that summary judgment is thus inappropriate. See

Aetna Casualty & Surety Co. v. Geiesow, 412 F.2d 468, 471 (2d Cir.1969). See also, e.g., Grand Union Co. v. Cord Meyer Development Corp., 735 F.2d 714 (2d Cir.1984). N.U.S. interprets the contract to mean that all recommendations made by N.U.S. that were subsequently acted upon by Sexton give rise to obligations under the contract. Sexton proposes that the contract can also be interpreted to mean that only "exclusive" recommendations by N.U.S., i.e., those not available from any other source, if adopted by Sexton, give rise to contractual obligations.

The court finds that the language of the contract is unambiguous. The contract states that any recommendation acted on shall be deemed accepted. This language unambiguously means that if N.U.S. recommends a course of action and Sexton subsequently takes that course and achieves utility bill savings as a result, Sexton is obligated to compensate N.U.S. The contract nowhere suggests or envisages an inquiry into the state of mind of Sexton or its officials to determine the degree to which they were influenced by factors other than the N.U.S. report to adopt the course of action recommended by N.U.S.

The court finds that, in light of the undisputed facts of this case, there are no genuine issues of material fact as to Sexton's obligations under the contract. It is also undisputed that Sexton did not forward its utility bills to N.U.S. for determination of amounts owed or make payments of any kind to N.U.S. Summary judgment is thus appropriate as to defendant's liability for breach of contract.

The court finds, however, that genuine issue of material fact exists as to the amount of damages. Plaintiff has the burden of proof on the issue of the amount of its damages. N.U.S. claims damages in the amount of $58,764.75. See Affidavit in Support of Plaintiff's Motion for Summary Judgment (filed Sept. 15, 1989) at 7. This number is not explained and no basis for the calculation used to reach it is provided. In view of the current state of the pleadings, summary judgment is not appropriate as to damages due to N.U.S. for Sexton's breach of contract.

Claim of Unjust Enrichment

Neither the plaintiff's nor the defendant's motion makes any reference to this claim. Thus summary judgment is not appropriate on this issue.

CUTPA Claim

Defendant seeks summary judgment as to the claim of violation of CUTPA, C.G.S. ss 42-110(a), et seq. Sexton argues that plaintiff cannot maintain a private right of action under CUTPA because the alleged conduct of defendants does not rise to the level of being offensive to public policy, immoral, unethical, oppressive, or unscrupulous, and it does not cause substantial injury to consumers.

The relevant section of CUTPA provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." C.G.S. s 42-110b. The Supreme Court

of Connecticut has defined "unfairness" as (1) whether the practice . . . offends public policy as it has been established by statutes, the common law, or otherwise . . . ; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (competitors or other businessmen). Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc., 190 Conn. 528, 539 n. 13 (1987) (citations omitted). Nevertheless, a practice may be "unfair" even if all three criteria are not met. See McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558 (1984); Gibbs v. Mace, 11 Conn.App. 289, 296 (1987).

N.U.S. concedes that Sexton's breach of contract alone is not sufficient to establish a CUTPA violation. See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment (filed Oct. 6, 1989) at 3. However it claims that "the totality of Sexton's egregious conduct," id., renders it liable under CUTPA. The court finds this argument unpersuasive. The "totality" of Sexton's conduct, as it emerges from the undisputed facts of this case, constitutes merely breach of contract and persistence in that breach in face of demands for performance by the other party to the contract. N.U.S. offers no evidence to indicate that the breach of contract at issue violated any "established concept of fairness." See Sorisio v. Lenox, Inc., 701 F.Supp. 950, 963 (D.Conn.1988) (Burns, J.). Summary judgment on this count is thus appropriate.

CONCLUSION

For the reasons stated above and upon a full review of the record, Plaintiff's Motion for Summary Judgment (filed Sept. 15, 1989) is GRANTED IN PART, as to liability on Count 1 (breach of contract) and DENIED in all other respects. Judgment as to liability only on Count 1 shall enter in due course for plaintiff. Defendant's Motion for [Partial] Summary Judgment Against Plaintiff, National Utility Service, Inc. (filed Sept. 15, 1989) is GRANTED. Judgment for defendant shall enter in due course on Count 3 of the complaint.

It is so ordered.